

## SUBCHAPTER H—CLAUSES AND FORMS

### PART 3452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

#### Subpart 3452.2—Texts of Provisions and Clauses

- Sec.  
3452.202-1 Definitions.  
3452.208-70 Printing.  
3452.209-70 Organizational conflict of interest.  
3452.215-33 Order of precedence.  
3452.215-70 Release of restricted data.  
3452.216-70 Additional cost principles.  
3452.216-71 Negotiated overhead rates—fixed.  
3452.227-70 Publication and publicity.  
3452.227-71 Paperwork Reduction Act.  
3452.227-72 Advertising of awards.  
3452.228-70 Required insurance.  
3452.232-70 Prohibition against the use of ED funds to influence legislation or appropriations.  
3452.232-71 Incremental funding.  
3452.232-72 Method of payment.  
3452.237-70 Identification of reports under consulting services contracts.  
3452.237-71 Services of consultants.  
3452.242-70 Litigation and claims.  
3452.242-71 Notice to the Government of delays.  
3452.242-72 Withholding of contract payments.  
3452.242-73 Accessibility of meetings, conferences, and seminars to persons with disabilities.  
3452.243-70 Key personnel.  
3452.247-70 Foreign travel.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

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#### Subpart 3452.2—Texts of Provisions and Clauses

##### 3452.202-1 Definitions.

As prescribed in 3402.201, insert the following clause in solicitations and contracts:

##### DEFINITIONS (AUG 1987)

(a) The term *Secretary* or *Head of the Agency* (also called *Agency Head*) means the Secretary or Under Secretary of the Department of Education; and the term *his/her duly authorized representative* means any person, persons, or board authorized to act for these officials.

(b) The term *contracting officer* means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

(c) The term *Contracting Officer's Technical Representative* means the person representing the Government for the purpose of technical monitoring of contract performance. The Contracting Officer's Technical Representative (COTR) is not authorized to issue any instructions or directions which effect any increases or decreases in the scope of work or which would result in the increase or decrease of the cost or price of this contract or a change in the delivery dates or performance period of this contract.

(d) The term *Department* or *ED* means the Department of Education.

(e) Except as otherwise provided in this contract, the term *subcontract* includes, but is not limited to, purchase orders and changes and modifications to purchase orders under this contract.

(End of clause)

##### 3452.208-70 Printing.

As prescribed in 3408.870, insert the following clause in all solicitations and contracts other than purchase orders:

##### PRINTING (AUG 1987)

Unless otherwise specified in this contract, the contractor shall not engage in, nor subcontract for, and printing (as that term is defined in Title I of the Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract; except that performance involving the reproduction of less than 5,000 production units of any one page, or less than 25,000 production units in the aggregate of multiple pages, shall not be deemed to be printing. A production unit is defined as one sheet, size 8½ by 11 inches, and one side and color only.

(End of clause)

##### 3452.209-70 Organizational conflict of interest.

As prescribed in 3409.570, insert the following provision in all certifications:

### 3452.215-33

#### ORGANIZATIONAL CONFLICT OF INTEREST (OCT 1987)

The offeror certifies that it ( ) is ( ) is not aware of any potential organization conflict of interest that it may have under this procurement. If the offeror is aware of any potential conflict of interest, the offeror shall submit a disclosure statement fully describing the situation. An organizational conflict of interest is as defined and illustrated in FAR 9.5.

(End of provision)

### 3452.215-33 Order of precedence.

As prescribed in 3415.406-3, insert the following clause in contracts:

#### ORDER OF PRECEDENCE (AUG 1987)

Any inconsistency in this contract shall be resolved by giving precedence in the following order:

- (a) The Schedule (excluding the work statement or specification).
- (b) The contract clauses (Section I).
- (c) Any incorporated documents, exhibits, or attachment, excluding the work statement or specifications and the contractor's proposal, representations, and certifications.
- (d) The work statement or specifications, and
- (e) The contractor's proposal, as amended, including representations and certifications.

(End of clause)

### 3452.215-70 Release of restricted data.

As prescribed in 3415.407, insert the following provision in solicitations:

#### RELEASE OF RESTRICTED DATA (AUG 1987)

(a) Offerors are hereby put on notice that regardless of their use of the legend set forth in FAR 52.215-12, *Restriction on Disclosure and Use of Data*, the Government may be required to release certain data contained in the proposal in response to a request for the data under the Freedom of Information Act. The Government's determination to withhold or disclose a record will be based upon the particular circumstance involving the data in question and whether the data may be exempted from disclosure under the Freedom of Information Act. In accordance with Executive Order 12600 and to the extent permitted by law, the Government will notify the offeror before it releases restricted data.

(b) By submitting a proposal or quotation in response to this solicitation:

(1) The offeror acknowledges that the Department may not be able to withhold nor deny access to data requested pursuant to the Act and that the Government's FOI officials shall make that determination;

### 48 CFR Ch. 34 (10-1-05 Edition)

(2) The offeror agrees that the Government is not liable for disclosure if the Department has determined that disclosure is required by the Act;

(3) The offeror acknowledges that proposals not resulting in a contract remain subject to the Act; and

(4) The offeror agrees that the Government is not liable for disclosure or use of unmarked data and may use or disclose the data for any propose, including the release of the information pursuant to requests under the Act.

(c) Offerors are cautioned that the Government reserves the right to reject any proposal submitted with (1) a restrictive legend or statement differing in substance from the one required by the solicitation provision in FAR 52.515-12, *Restriction on Disclosure and Use of Data*, or (2) a statement taking exceptions to the terms of (a) or (b) of this provision.

(End of provision)

### 3452.216-70 Additional cost principles.

Insert the following clause in solicitations and contracts as prescribed in 3416.307(b):

#### ADDITIONAL COST PRINCIPLES (AUG 1987)

(a) *Bid and Proposal Costs.* Bid and proposal costs are the immediate costs of preparing bids, proposals, and applications for potential Federal and non-Federal grants, contracts, and other agreements, including the development of scientific, cost and other data needed to support the bids, proposals and applications. Bid and proposal costs of the current accounting period are allowable as indirect costs; bid and proposal costs of past accounting periods are unallowable as costs of the current period. However, if the organization's established practice is to treat these costs by some other method, they may be accepted if they are found to be reasonable and equitable. Bid and proposal costs do not include independent research and development costs or pre-award costs.

(b) *Independent research and development costs.* Independent research and development is research and development that is not sponsored by Federal and non-Federal grants, contracts, or other agreements. Independent research and development shall be allocated its proportionate share of indirect costs on the same basic as the allocation of indirect costs of sponsored research and development. The costs of independent research and development, including its proportionate share of indirect costs, are unallowable.

## Department of Education

3452.227-70

(End of clause)

### **3452.216-71 Negotiated overhead rates—fixed.**

Insert the following clause in cost-reimbursement contracts as prescribed in 3416.701:

#### **NEGOTIATED OVERHEAD RATES—FIXED (AUG 1987)**

(a) Notwithstanding the provisions of the clause entitled "Allowable Cost and Payment", the allowable indirect costs under this contract shall be obtained by applying negotiated fixed overhead rates for the applicable period(s) to bases agreed upon by the parties, as specified below. A negotiated fixed rate(s) is based on an estimate of the costs which will be incurred during the period for which the rate(s) applies. If the application of the negotiated fixed rates(s) against the actual bases during a given fiscal period produces an amount greater or less than the indirect costs determined for that period, the greater or lesser amount(s) will be carried forward to a subsequent period.

(b) The contractor, as soon as possible but no later than six months after the close of its fiscal year, or such other period as may be specified in the contract, shall submit to the contracting officer or the duly authorized representative, with a copy to the cognizant audit activity, a proposed fixed overhead rate or rates based on the contractor's actual cost experience during the fiscal year, including adjustment, if any, for amounts carried forward, together with supporting cost data. Negotiation of fixed overhead rates, including carry-forward adjustments, if any, by the contractor and the contracting officer, or the duly authorized representative, shall be undertaken as promptly as practicable after receipt of the contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(d) The results of each negotiation shall be set forth in an amendment to this contract, which shall specify (1) the agreed fixed overhead rates, (2) the bases to which the rates apply, (3) the fiscal year, unless the parties agreed to a different period, for which the rates apply, and (4) the specific items treated as direct costs or any changes in the items previously agreed to be direct costs.

(e) Pending establishment of fixed overhead rates for any fiscal year or different period agreed to by the parties, the contractor shall be reimbursed either at the rates fixed for the previous fiscal year or other period or at billing rates acceptable to the contracting officer, subject to appropriate adjustment

when the final rates for the fiscal year or other period are established.

(f) Any failure of the parties to agree on any fixed rate or rates or to the amount of any carry-forward adjustment under this clause shall not be considered a dispute for decision by the contracting officer within the meaning of the Disputes clause of this contract. If for any fiscal year or other period specified in the contract, the parties fail to agree to a fixed overhead rate or rates, it is agreed that the allowable indirect costs under this contract shall be obtained by applying negotiated final overhead rates, in accordance with the terms of the Allowable Cost and Payment clause, in effect on the date of this contract.

(g) Submission of proposed fixed, provisional, and/or final overhead rates, together with appropriate data in support thereof, to the contracting officer or the duly authorized representative and agreements on fixed, provisional, and/or final overhead rates entered into between the contractor and the contracting officer or the duly authorized representative, as evidenced by negotiated overhead rate agreements signed by both parties, shall satisfy the requirements of paragraphs (b), (c), (d), and (e) of this clause.

(End of clause)

### **3452.227-70 Publication and publicity.**

As prescribed in 3427.470, insert the following clause in all solicitations and contracts other than purchase orders:

#### **PUBLICATION AND PUBLICITY (AUG 1987)**

(a) Unless otherwise specified in this contract, the contractor is encouraged to publish and otherwise promote the results of its work under this contract. A copy of each article or work submitted by the contractor for publication shall be promptly sent to the Contracting Officer's Technical Representative. The contractor shall also inform the representative when the article or work is published and furnish a copy in the published form.

(b) The contractor shall acknowledge the support of the Department of Education in publicizing the work under this contract in any medium. This acknowledgment shall read substantially as follows:

"This project has been funded at least in part with Federal funds from the U.S. Department of Education under contract number \_\_\_\_\_. The content of this publication does not necessarily reflect the views or policies of the U.S. Department of Education nor does mention of trade names, commercial products, or organizations imply endorsement by the U.S. Government."

**3452.227-71**

(End of clause)

**3452.227-71 Paperwork Reduction Act.**

As prescribed in 3427.471, insert the following clause in all solicitations and contracts:

**PAPERWORK REDUCTION ACT (AUG 1987)**

(a) The Paperwork Reduction Act of 1980 (Pub. L. 96-511) applies to contractors that collect information for use or disclosure by the Federal Government.

If the contractor will collect information requiring answers to identical questions from 10 or more people then no plan, questionnaire, interview guide, or other similar device for collecting information may be used without first obtaining clearance from the Deputy Under Secretary for Management (DUSM) or his/her delegate within the Department of Education (ED) and the Office of Management and Budget (OMB). Contractors and Contracting Officers' Technical Representatives shall be guided by the provisions of 5 CFR part 1320, Controlling Paperwork Burdens on the Public, and seek the advice of the Department's Paperwork Clearance Officer to determine the procedures for acquiring DUSM and OMB clearance.

(b) The contractor shall obtain the required DUSM and OMB clearance through the Contracting Officer's Technical Representative before expending any funds or making public contacts for the collection of information described in paragraph (a) of this clause. The authority to expend funds and proceed with the collection shall be in writing by the contracting officer. The contractor must plan at least 120 days for DUSM and OMB clearance. Excessive delay caused by the Government which arises out of causes beyond the control and without the fault or negligence of the contractor will be considered in accordance with the Excusable Delays or Default clause of this contract.

(End of clause)

**3452.227-72 Advertising of awards.**

As prescribed in 3427.472, insert the following clause in all solicitations and contracts other than purchase orders:

**ADVERTISING OF AWARDS (AUG 1987)**

The contractor agrees not to refer to awards issued by the Department of Education in commercial advertising in such a manner as to state or imply that the product or service provided is endorsed by the Federal Government or is necessarily considered by the Government to be superior to other products or services.

**48 CFR Ch. 34 (10-1-05 Edition)**

(End of clause)

**3452.228-70 Required insurance.**

As prescribed in 3428.370, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

**REQUIRED INSURANCE (AUG 1987)**

(a) The contractor shall procure and maintain such insurance as required by law or regulation, including but not limited to the requirements of FAR subpart 28.3 or by the written direction of the contracting officer. Prior written approval of the contracting officer shall be required with respect to any insurance policy the premiums for which the contractor proposes to treat as a direct cost under this contract and with respect to any proposed qualified program of self-insurance. The terms of any other insurance policy shall be submitted to the contracting officer for approval upon request.

(b) Unless otherwise authorized in writing by the contracting officer, the contractor shall not procure or maintain for its own protection any insurance covering loss or destruction of or damage to Government property.

(End of clause)

**3452.232-70 Prohibition against the use of ED funds to influence legislation or appropriations.**

The following clause is to be used in accordance with 3432.770:

**PROHIBITION AGAINST THE USE OF ED FUNDS TO INFLUENCE LEGISLATION OR APPROPRIATIONS (APR 1987)**

No part of any funds under this contract shall be used to pay the salary and expenses of any contractor, or agency acting for the contractor, to engage in any activity designed to influence legislation or appropriations pending before the Congress.

(End of clause)

**3452.232-71 Incremental funding.**

As prescribed in 3452.771, insert the following provision in solicitations:

**INCREMENTAL FUNDING (AUG 1987)**

(a) Sufficient funds are not presently available to cover the total cost of the complete project described in this solicitation. However, it is the Government's intention to negotiate and award a contract using the incremental funding concepts described in the clause titled "Limitation of Funds" in FAR 52.232-22. Under that clause, which will be included in the resultant contract, initial

## Department of Education

3452.237-71

funds will be obligated under the contract to cover an estimated base performance period. Additional funds are intended to be allotted to the contract by contract modification, up to and including the full estimated cost of the entire period of performance. This intent notwithstanding, the Government will not be obligated to reimburse the contractor for cost incurred in excess of the periodic allotments, nor will the contractor be obligated to perform in excess of the amount allotted.

(b) The Limitation of Cost clause in FAR 52.232-20 shall supersede the Limitation of Funds clause in the event the contract becomes fully funded.

(End of provision)

### 3452.232-72 Method of payment.

As prescribed in 3432.170, insert the following clause in all solicitations and contracts:

#### METHOD OF PAYMENT (AUG 1987)

(a) Payments under this contract will be made either by check or by wire transfer through the Treasury Financial Communications System at the option of the Government.

(b) The contractor shall forward the following information in writing to (designated payment party) not later than seven days after receipt of notice of award.

(1) Full name (where practicable), title, phone number, and complete mailing address of responsible official(s) to whom check payments are to be sent, and who may be contacted concerning the bank account information requested below.

(2) The following bank account information required to accomplish wire transfers:

(i) Name, address, and telegraphic abbreviation of the receiving financial institution:

(ii) Receiving financial institution's nine-digit American Bankers Association (ABA) identifying number for routing transfer of funds. (Provide this number only if the receiving financial institution has access to the Federal Reserve Communications System.)

(iii) Recipient's name and account number at the receiving financial institution to be credited with the funds.

(iv) If the receiving financial institution does not have access to the Federal Reserve Communications System, provide the name of the correspondent financial institution through which the receiving financial institution receives electronic funds transfer messages. If a correspondent financial institution is specified, also provide the address and telegraphic abbreviation of that institution and its nine-digit ABA identifying number for routing transfer of funds.

(c) Any changes to the information furnished under paragraph (b) of this clause

shall be furnished to (designated payment office) in writing at least 30 days before the effective date of the change. It is the contractor's responsibility to furnish these changes promptly to avoid payments to erroneous addresses or bank accounts.

(d) The document furnishing the information required in paragraphs (b) and (c) must be dated and contain the signature, title, and telephone number of the contractor's official authorized to provide it, as well as the contractor's name and contract number.

(End of clause)

### 3452.237-70 Identification of reports under consulting services contracts.

As prescribed in 3437.270, insert the following clause in all solicitations and contracts for consulting services:

#### IDENTIFICATION OF REPORTS UNDER CONSULTING SERVICE CONTRACTS (AUG 1987)

The contractor shall set forth on the cover of every report submitted pursuant to this contract the following information:

(a) Name and business address of the contractor; (b) contract number; (c) contract dollar amount; (d) whether the contract was competitively or noncompetitively awarded; (e) name of the Contracting Officer's Technical Representative and complete office identification and address; and (f) names of the managerial and professional personnel responsible for the content and preparation of the report.

(End of clause)

### 3452.237-71 Services of consultants.

As prescribed in 3437.271, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

#### SERVICES OF CONSULTANTS (AUG 1987)

Except as otherwise expressly provided elsewhere in this contract, and notwithstanding the provisions of the clause of the contract entitled "Subcontracts Under Cost-Reimbursement and Letter Contracts," the prior written approval of the contracting officer shall be required:

(a) If any employee of the contractor is to be paid as a "consultant" under this contract; and

(b) For the utilization of the services of any consultant under this contract exceeding the daily rate set forth elsewhere in this contract or, if no amount is set forth, \$150, exclusive of travel costs, or if the services of any consultant under this contract will exceed 10 days in any calendar year.

**3452.242-70**

If that contracting officer's approval is required, the contractor shall obtain and furnish to the contracting officer information concerning the need for the consultant services and the reasonableness of the fees to be paid, including, but not limited to, whether fees to be paid to any consultant exceed the lowest fee charged by consultant to others for performing consultant services of a similar nature.

(End of clause)

**3452.242-70 Litigation and claims.**

As prescribed in 3442.7002, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

**LITIGATION AND CLAIMS (AUG 1987)**

(a) The contractor shall give the contracting officer immediate notice in writing of:

(1) Any action, filed against the contractor arising out of the performance of this contract, including any proceeding before any administrative agency or court of law, and also including, but not limited to, the performance of any subcontract hereunder; and

(2) Any claim against the contractor for a cost which is allowable under the clause entitled "Allowable Cost and Payment."

(b) Except as otherwise directed by the contracting officer, the contractor shall immediately furnish the contracting officer copies of all pertinent papers received under that action or claim.

(c) If required by the contracting officer, the contractor shall:

(1) Effect an assignment and subrogation in favor of the Government of all the contractor's rights and claim (except those against the Government) arising out of the action or claim against the contractor; and

(2) Authorize the Government to settle or defend the action or claim and to represent the contractor in, or to take charge of, the action.

(d) If the settlement or defense of an action or claim is undertaken by the Government, the contractor shall furnish all reasonable required assistance. However, if an action against the contractor is not covered by a policy of insurance, the contractor shall notify the contracting officer and proceed with the defense of the action in good faith.

(e) To the extent not in conflict with any applicable policy of insurance, the contractor may, with the contracting officer's approval, settle any such action or claim.

(f)(1) The Government shall not be liable for the expense of defending any action or for any costs resulting from the loss thereof to the extent that the contractor would have been compensated by insurance that was required by law, regulation, contract clause, or

**48 CFR Ch. 34 (10-1-05 Edition)**

other written direction of the contracting officer, but which the contractor failed to secure through its own fault or negligence.

(2) In any event, unless otherwise expressly provided in this contract, the contractor shall not be reimbursed or indemnified by the Government for any cost or expense of liability that the contractor may incur or be subject to by reason of any loss, injury, or damage, to the person or to real or personal property of any third parties as may arise from the performance of this contract.

(End of clause)

**3452.242-71 Notice to the Government of delays.**

As prescribed in 3442.7003, insert the following clause in all solicitations and contracts other than purchase orders:

**NOTICE TO THE GOVERNMENT OF DELAYS (AUG 1987)**

Whenever the contractor has knowledge that any actual or potential situation, including but not limited to labor disputes, is delaying or threatens to delay the timely performance of work under this contract, the contractor shall immediately give written notice thereof, including all relevant information with respect thereto, to the contracting officer.

(End of clause)

**3452.242-72 Withholding of contract payments.**

As prescribed in 3442.7001, insert the following clause in all solicitations and contracts other than purchase orders:

**WITHHOLDING OF CONTRACT PAYMENTS (AUG 1987)**

Notwithstanding any other payment provisions of this contract, failure of the contractor to submit required reports when due or failure to perform or deliver required work, supplies, or services, or failure to meet any of the requirements of the contract, will result in the withholding of payments under this contract in such amounts as the contracting officer deems appropriate, unless the failure arises out of causes beyond the control, and without the fault of negligence, of the contractor, as defined by the clause entitled "Excusable Delays" or "Default", as applicable. The Government shall promptly notify the contractor of its intention to withhold payment of any invoice or voucher submitted. Payment will be withheld until the failure is cured, a new delivery schedule is agreed upon, or payment is made as part of a termination settlement.

## Department of Education

3452.247-70

(End of clause)

### **3452.242-73 Accessibility of meetings, conferences, and seminars to persons with disabilities.**

As prescribed in 3442.7101(b), insert the following clause in all solicitations and contracts:

ACCESSIBILITY OF MEETINGS, CONFERENCES, AND SEMINARS TO PERSONS WITH DISABILITIES (AUG 1987)

The contractor shall assure that any meeting, conference, or seminar held pursuant to the contract will meet all applicable standards for accessibility to persons with disabilities pursuant to section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) and any implementing regulations of the Department.

(End of clause)

### **3452.243-70 Key personnel.**

As prescribed in 3443.106(b), insert the following clause in all solicitations and resultant cost-reimbursement contracts:

KEY PERSONNEL (AUG 1987)

The personnel designated as key personnel in this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified indi-

viduals to other programs, or otherwise substituting any other personnel for specified personnel, the contractor shall notify the contracting officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the contract effort. No diversion or substitution shall be made by the contractor without the written consent of the contracting officer; *provided*, that the contracting officer may ratify a diversion or substitution in writing and that ratification shall constitute the consent of the contracting officer required by this clause. The contract shall be modified to reflect that addition or deletion personnel.

(End of clause)

### **3452.247-70 Foreign travel.**

As prescribed in 3447.7000, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

FOREIGN TRAVEL (AUG 1987)

Foreign travel shall not be undertaken without the prior written approval of the contracting officer. As used in this clause, "foreign travel" means travel outside the fifty States comprising the United States, the District of Columbia, and Canada.

(End of clause)